In the Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1348

WILLIAM LEAMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Law Offices of
MARTIN BLITSTEIN
MELVYN KESSLER *of Counsel*
Attorney for Petitioner
1440 N.W. 14th Avenue
Miami, Florida 33125
(305) 324-1140

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to Review the Order of that Court rendered on January 28, 1977, and the Order denying the

Petition for Rehearing rendered on February 17, 1977, which affirmed the verdict issued by the United States District Court for the Southern District of Florida, convicting him on three counts of a multicount indictment. The Petitioner was convicted on Count III for violating Title 21, U.S.C., Section 841(a)(1) and Title 21, U.S.C., Section 846 and the Judgment and Sentence of the Court on Count III was five (5) years confinement with a special parole term of three (3) years, with a recommendation that the Petitioner become eligible for parole in fifteen (15) months. The Petitioner was additionally fined the sum of Ten Thousand Dollars ($10,000.00). The Petitioner was convicted on Count IV for violating Title 21, U.S.C., Section 841(a)(1) and the Judgment and Sentence of the Court on Count IV was five (5) years confinement. The Petitioner was convicted of Count V for violating Title 21, U.S.C., Section 841 (a)(1) and Title 18, U.S.C., Section 2, and the Judgment and Sentence of the Court on Count V was five (5) years confinement. The Sentence is imposed as to Counts III, IV and V were to run concurrently.

OPINION BELOW

Petitioner's convictions were affirmed on January 28, 1977 and his Petition for Re-Hearing was denied February 17, 1977 by the Court of Appeals for the Fifth Circuit and is attached in the Appendix, pages 1 through 9.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL WHERE THE TRIAL COURT REFUSED TO GRANT A MISTRIAL AFTER THE PROSECUTOR DELIBERATELY ASKED QUESTIONS OF THE PETITIONER WHICH WERE PATENTLY IMPROPER AND HIGHLY PREJUDICIAL, ONE OF SAID QUESTIONS BEING ASKED IMMEDIATELY AFTER THE TRIAL COURT ADMONISHED THE PROSECUTOR AGAINST ASKING THE QUESTION?

2. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE AGAINST THE PETITIONER, ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS OR THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF A CONSPIRACY AND PETITIONER'S PARTICIPATION IN IT BY OTHER INDEPENDENT EVIDENCE?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES
SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

STATEMENT OF THE CASE

Reference to Record on Appeal will be referred to by the symbol "R". Reference to Transcript will be referred to by the symbol "T".

On November 13, 1975, a Federal Grand Jury in and for the Southern District of Florida returned an indictment against the Petitioner. (R. 1-3(a)). On December 11, 1975, a Federal Grand Jury for the Southern District of Florida returned a superseding five (5) count indictment, Count III, IV and V of which charged the Petitioner with violations of Title 21, U.S.C., §841(a)(1) and §846 and Title 18, U.S.C., §2. (R. 8-11)

The Trial commenced March 1, 1976 and the jury returned a verdict against the Petitioner as to Counts III, IV and V. (T. 154) Petitioner was sentenced on March 29, 1976 to three (3) concurrent five (5) year terms of confinement and a Ten Thousand Dollar ($10,000.00) fine. (T. 154-155)

On March 29, 1976, Petitioner timely filed a Notice of Appeal to the United States Court of Appeals, Fifth Circuit, which on January 28, 1977 affirmed the Trial Court's Judgment and Sentence. The Petition for rehearing was denied February 17, 1977.

The Petitioner was convicted of possession with intent to distribute cocaine, distribution of cocaine, conspiracy to possess with intent to distribute and distributing cocaine.

Jose A. Roque, Special Agent for the Drug Enforcement Administration testified at trial that he spoke with

one Scott Sheldon concerning the purchase of cocaine. (T. 10) Pursuant to this conversation, one Mitchell Soloman contacted Roque with regards to the drug transaction. (T.11)

Defense counsel objected to the admission of hearsay against the Petitioner until there was independent evidence of a conspiracy. (T. 11) (T. 26-27) (T. 121) The Trial Court overruled the objections and denied Motions to Strike.

Roque testified that he received a sample of cocaine from Soloman on August 28, 1975. (T. 15) A meeting was scheduled for later that day. At the scheduled time Roque met with Soloman and Sheldon. (T. 18) Roque went with Soloman to the apartment of one Carol Brock. (T. 21)

Roque testified that Brock stated "that there was only one other person in the apartment; that he was the owner of the cocaine; . . . " (T. 21-22) Roque further testified that Brock stated that there was less than the agreed upon pound of cocaine and that "he was in the rear bedroom and at the present time was trying to figure out the difference in price between the full pound and the lesser amount." (T. 22)

Brock brought out the cocaine and a scale. (T. 22) While Soloman and Brock were in another room, Roque signaled to other agents, and Brock, Soloman and the Petitioner were arrested. Roque testified the Petitioner was in the rear bedroom of the apartment. (T. 23)

Roque testified that he had never met the Petitioner until after his arrest. (T. 27) He further stated that he dealt strictly with Soloman and Sheldon. (T. 29) He fur-

ther stated that he never saw the Petitioner in possession of any controlled substance prior to the arrest, and never saw the Petitioner aid, assist, or abet any of the three co-defendants prior to the arrest. (T. 47-48)

Mitchell Soloman, a co-defendant, testified that he met with Carol Brock on August 27, 1975 and talked to her about picking up a "taste of cocaine". Mr. Soloman testified the Petitioner was there also. (T. 65) Soloman also stated that the Petitioner was in Carol Brock's apartment on August 28, 1975, the day of the arrest. (T. 71) Soloman stated that on that occasion, Brock brought out the cocaine and scales to weigh it. (T. 71-72) Soloman stated that he never saw the Petitioner in possession of the bag of cocaine or the scale. (T. 113-114)

The Petitioner moved for Judgment of Acquittal at the close of the government's case which was denied. (T. 123-124)

The Petitioner, WILLIAM LEAMAN, testified that during the dates of the alleged conspiracy, he did not see Sheldon and did not conspire with Brock or Soloman to do any criminal act against the United States. (T. 130-131)

The Petitioner stated that he went to Brock's apartment on August 27, 1975, for dinner with her (T. 131); Soloman entered the apartment with a brown valise (T. 131); Brock and Soloman entered the bedroom and Petitioner had no knowledge of what was happening. (T. 132)

On August 28, 1975, the Petitioner went to Brock's house for a dinner date. (T. 133) Brock told the Petitioner to stay in the bedroom for a while and not to come into

the living room. (T. 133) Brock returned a few minutes later and picked up the metal scale and the bag from the closet and walked out. (T. 133, 140-142) Several minutes later, Soloman walked into the bedroom and asked Leaman to help them figure out something dealing with figures. (T. 134) Several minutes later, Brock, Soloman and the Petitioner were arrested. (T. 134)

On Cross-Examination of the Petitioner, the Prosecutor asked the question:

> "Are you aware of the drug problem in the community?" (T. 145)

The Petitioner's attorney thereupon moved for mistrial, which was denied. The Trial Court thereupon admonished the prosecutor:

> " . . . I take it that you know that I think that you went too far in asking what the problem was in the community."

The prosecutor thereupon asked the following question:

> "Are you aware that drugs are common in this community?" (T. 146-147)

Petitioner's attorney thereupon renewed his Motion for Mistrial. The Motion was denied and the Trial Court advised the jury to disregard the questions. (T. 147)

After the defense rested, motions for verdicts of acquittal were made and were denied by the Trial Court. (T. 149)

ARGUMENT

POINT I

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL WHERE THE TRIAL COURT REFUSED TO GRANT A MISTRIAL AFTER THE PROSECUTOR DELIBERATELY ASKED QUESTIONS OF THE PETITIONER WHICH WERE PATENTLY IMPROPER AND HIGHLY PREJUDICIAL, ONE OF SAID QUESTIONS BEING ASKED IMMEDIATELY AFTER THE TRIAL COURT ADMONISHED THE PROSECUTOR AGAINST ASKING THE QUESTION.

The Petitioner was denied his Sixth Amendment right to a fair trial as a result of the Prosecutor asking the Petitioner questions which were highly improper and prejudicial to the rights of the Petitioner. The Trial Court erred in failing to grant a mistrial after the Prosecutor made clear that it was her unmistakable intent to prejudice the rights of the Petitioner by use of improper questions and comments aimed toward influencing the jury with emotionally-charged extraneous matters. The conduct of the Prosecutor and the Trial Court's failure to grant the mistrial as a result of said conduct departs from the accepted and usual course of judicial proceedings. The Fifth Circuit Court of Appeals has sanctioned this departure and it is incumbent upon the Supreme Court of the United States to exercise its power of supervision over the Lower Courts. For this reason, Certiorari should be granted.

It is clear from the record that the United States Attorney, after being warned about the impropriety of a question to the Petitioner, went ahead and made the same improper and prejudicial statement before the jury (T. 145-147), with the intent to prejudice the Petitioner's testimony. At page 145-147:

> Q. (Schwartz): Are you aware of the drug problem in the community?
>
> Engel: Your Honor, I'm going to object to this. I want to make a motion at side bar at this time.
>
> The Court: All right.
>
> Mr. Engel: Comes now the defendant William Leaman and makes this his motion for mistrial based upon the impropriety of the statement of the Assistant U.S. Attorney before this jury for the particular purpose to deny this defendant his day in court and due process and with particular purpose to prejudice his testimony before the Court by extraneous matters not brought out in direct or indirect. The cases hold that you cannot bring this type of questioning out before the jury about what a problem is in the community because it invokes sympathy. That's the only purpose. So I will make this my motion for mistrial.
>
> Miss Schwartz: Your Honor, I couldn't hear everything he said but I would say that ot [sic]

what I did hear that this charge goes to intent, to knowledge, and we are trying to show that he does have this knowledge.

Mr. Engel: It isn't a question — she asked about the community, that's the thing that disturbs me. This particularly tends to prejudice this defendant in his day in Court.

The Court: I think you are entitled to go into anything that would show intent as far as he is concerned but not as far as what the community is.

I'm going to deny the motion for mistrial. I am going to tell the jury to disregard it.

Mr. Engel: Your Honor, would you admonish counsel not to go into these things so we don't have —

The Court: . . . I take it that you know that I think that you went too far in asking what the problem was in the community. All right.

Q. (Schwartz): Are you aware that drugs are common in this community?

The Court: Just a minute.

Mr. Engel: Your Honor, I'm going to renew my motion and can I come up to the side bar?

The Court: Members of the jury, I have sustained counsel's objection to the last question about what the problems are in the community. You are not to take that into consideration during the course of your deliberations in this case because that would be improper. You are not to consider it at all. Cast it out of your mind entirely.

Now, I don't want any more questions along that line.

It is clear, that after the Assistant U.S. Attorney was warned by the judge to avoid certain questioning that was improper, she continued to ask the same improper questions.

The Petitioner argues that this impropriety was brought up twice and magnified the prejudice that it caused to Petitioner's testimony.

The warning to strike the improper testimony from the jurors' minds, in reality only served to reiterate and keep in their minds, the improper discussion and questioning as to subject matter that was improperly before them.

The United States Supreme Court in *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620 (1968) stated:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a fu-

tile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Furthermore, the Supreme Court in *Bruton*, supra, added:

> . . . the Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

To the same effect is the statement of Mr. Justice Jackson in his concurring opinion in *Krulewitch v. U. S.*, 336 U.S. 440, 453, 69 S.Ct. 716, 723 (1949) where he stated:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

This Court in *Odom vs. U. S.*, 377 F.2d 853 (5th Cir., 1967) stated:

> *Connor vs. U. S.*, 5 Cir., 1963, 322 F.2d 647, enunciates the general principle that an erroneous admission of evidence is cured by instructing the jury to disregard it *where substantial rights of the defendant are not affected . . . that is, where* guilt is *clear* and error, if any is harmless . . . However, where, as here, the testimony is highly prejudicial and otherwise irrelevant to the case.

Not declaring a mistrial constitutes plain error under Fed R. Crim P. 52 (b) and is not cured by a court admonition to disregard.

It is apparent from the judge's comments (T.146-147) and existing case law that the prosecutor's statements, in the form of questions, were improper, and, as the Petitioner contends, prejudicial towards his receiving a fair and impartial trial.

A prosecutor's remarks cannot *imply* that evidence not before the jury implicates the Petitioner. *U. S. vs. Martinez*, 466 F.2d 679 (5th Cir., 1972).

A deliberate and calculated effort to prejudice Petitioner *by references to matters not in evidence cannot be tolerated. U. S. vs. Whitmore*, 480 F.2d 1154 (C.A. D.C., 1973)

It is fundamental to sound procedure in Federal criminal prosecutions that counsel refrain from an appeal wholly irrelevant to any facts or issues in case, purpose and effect of which could only be to arouse passion and prejudice, *particularly in those situations in which statements are designed to imply actions on part of Petitioner about which no competent evidence has been admitted. U.S. vs. Hayward*, 420 F.2d 142 (C.A. D.C., 1969).

In the case at bar, the question and remark about the community's drug problem was highly improper and prejudicial and was used as an inference towards the Petitioner, as well as invoking sympathy from the jury. The remark is prejudicial in that it prevents the jurors from determin-

ing the guilt or innocence of the Petitioner from the competent evidence before them, and instead it appeals to the jurors' hatred and dislike of any "drug-filled" community, which might even be their own.

An inference not reasonably deductible from the evidence, but supported only by the improper implication that there was existent, but unstated, evidence of which the jury did not have the benefit, may not be stated. *Hall vs. U.S.*, 419 F.2d 582 (5th Cir., 1969).

Insinuation and innuendo about collateral matters should play no part in prosecution of a criminal charge. *U.S. vs. Callahan*, 450 F.2d 145 (4th Cir., 1971).

The Prosecutor's improper conduct injected such immaterial and erroneous points into deliberative process that prompt instruction by the Trial Court to the jury to disregard the statements could not remove the prejudice. The highly improper and prejudicial statements intentionally laid before the jury could not be erased from the jury's minds or removed from their deliberation sby an instruction. The jurors' deliberations were necessarily influenced by the prosecutor's comments and resulted in denying the Petitioner a fair and impartial trial. A mistrial should have been granted.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE AGAINST THE PETITIONER, ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS OR THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF A CONSPIRACY AND PETITIONER'S PARTICIPATION IN IT BY OTHER INDEPENDENT EVIDENCE.

The Trial Court erroneously admitted into evidence against the Petitioner hearsay uttered by an alleged co-conspirator prior to the government proving the Petitioner had joined conspiracy. In fact, but for the improperly admitted hearsay, the government failed to come forward with any evidence to prove the Petitioner's involvement with the conspiracy. Without the hearsay evidence, the government's evidence was insufficient to convict the Petitioner, not only on the conspiracy count, but also on the counts charging the Petitioner with distribution of cocaine and possession with intent to distribute cocaine. The admission of hearsay rises to "plain error" since without it, there would have been insufficient evidence to convict the Petitioner on any of the three (3) counts. The admission of the hearsay materially affected the substantial rights of the Petitioner, and reversal is warranted. Federal Rules of Criminal Procedure 52 (b); *Flores vs. Estelle*, 513 F.2d 764 (5th Cir. 1975), cert. denied, 423 U.S. 989, 96 S.Ct. 401 (1975); *Smith vs. United States*, 343 F.2d 539, 542 (5th Cir.) cert. denied, 382 U.S. 861, 86 S.Ct. 122 (1965); *Glenn vs. United States*, 271 F.2d 880, 883 (6th Cir. 1959).

The evidence adduced at trial viewed in a light most favorable to the government, is that Agent Roque never met the Petitioner until after his arrest (T. 27); that all dealings were strictly with Soloman and Sheldon (T. 29); that Roque never saw Leaman in possession of any controlled substance (T. 47, 48); that Roque never saw Leaman aid, assist or abet any of the other three co-defendants (T. 48); that the sample of cocaine was received from Soloman (T. 15); that the apartment used for the transaction belonged to Brock (T. 21); that it was Brock who brought out the cocaine and the scale (T. 22). Soloman testified that he never saw the Petitioner in possession of the bag of cocaine (T. 113); that he never saw the defendant in possession of the scale (T. 114); and that Leaman was present at the scene of the transaction when the arrests were made (T. 23).

In the absence of the hearsay statement by Brock, the only evidence against the Petitioner showed that the Petitioner associated with others who participated in a drug transaction. Such is certainly not enough to have convicted Leaman of conspiracy. *Roberts vs. United States*, 416 F.2d 1216 (5th Cir. 1969) and *United States vs. Arroyave*, 477 F.2d 157 (5th Cir. 1973). Nor was his mere presence at the scene of a conspiracy sufficient to prove one's guilt of conspiracy. *United States vs. Owen*, 492 F.2d 1100 (5th Cir. 1974).

There is simply no evidence presented by the government to show beyond a reasonable doubt that Leaman intended to join and become a part in the illegal venture and agreement. *United States vs. Amato*, 495 F.2d 545 (5th Cir. 1974).

The evidence adduced by the government, absent of the hearsay, was insufficient to convict the Petitioner on

any count. However, the hearsay evidence, and it alone, was sufficiently damaging to provide a basis to convict the Petitioner. The hearsay in question is the following testimony given by Agent Roque concerning the statement made by Carol Brock to him:

> "... That there was only one other person in the apartment; that he was the owner of the cocaine; ... (T. 21, 22)"

Agent Roque further testified that Brock stated that:

> ... That he [Leaman] was in the rear bedroom and at the present time was trying to figure out the difference in price between the full pound and the lesser amount. (T. 22)

But for the hearsay statements, the government failed to produce any independent evidence showing Petitioner to be part of the conspiracy.

Montford vs. U.S., 200 F.2d 759 (5th Cir., 1952) states the rule in this Circuit that:

> ... a defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof *aliunde* of the existence of the conspiracy and of the defendant's connection with it, before such statements become admissible as against a defendant not present when they were made.

In the recent case of *U.S. vs. Nixon*, 94 S.Ct. 3090 (1974), the United States Supreme Court required a sufficient showing by *independent evidence* of a conspiracy

among one or more other defendants and the declarant before the hearsay acts and declarations are admissible against the Petitioner.

The same is true of declarations of co-conspirators who are not defendants in the case on trial. *Dutton vs. Evans*, 400 U.S. 74, 81, 91 S.Ct. 210, 215 (1970).

In *Nixon*, supra, the Court refers to *U.S. vs. Vaught*, 485 F.2d 320, 323 (4th Cir., 1973) which held that as a preliminary matter there must be substantial *independent evidence* of the conspiracy before declarations by one defendant may be admissible against other defendants.

The Government must introduce sufficient independent evidence of the existence of a conspiracy and of Petitioner's participation therein before the judge may allow declarations of the co-conspirator, made outside of the defendant to go to the jury. *U.S. vs. Rodriguez*, 509 F.2d 1342 (5th Cir., 1975). *U.S. vs. Apollo*, 476 F.2d 156, 157 (5th Cir., 1973).

The government failed to put on sufficient independent evidence to show the Petitioner joined or intended to join a conspiracy and thus, the hearsay is inadmissible. Petitioner constantly made the Court aware of his objection to the hearsay evidence (T. 11, 26, 121-122). The Petitioner's objections could be construed as a standing objection to hearsay. Regardless, the admission of the hearsay is reversible as "plain error" in that it materially effected substantial rights of the Petitioner. The Trial Court should have stricken the hearsay statements. Its failure to strike them resulted in three convictions against the Petitioner. This cause should be reversed and remanded to the Trial Court for a new trial.

CONCLUSION

Petitioner respectfully contends that the Petition for Writ of Certiorari should be granted, the Judgment of the Fifth Circuit reversed, and the Final Judgment and Sentence of the Trial Court reversed and set aside.

Respectfully submitted,

LAW OFFICES OF
MARTIN BLITSTEIN
MELVYN KESSLER *of Counsel*
Attorneys for Petitioner
1440 N.W. 14th Avenue
Miami, Florida 33125
(305) 324-1140

By MELVYN KESSLER
of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to Solicitor General, Department of Justice, Washington, D.C., 20530, this day of March, 1977.

MELVYN KESSLER
of Counsel

APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 76-2009.

UNITED STATES of America,
Plaintiff-Appellee,
v.

William D. LEAMAN,
Defendant-Appellant.

Jan. 28, 1977.

By a judgment of the United States District Court for the Southern District of Florida, at Miami, Jack K. Regan, J., the defendant was convicted of conspiracy to possess, possessing with intention to distribute, and distributing cocaine and he appealed. The Court of Appeals, Clark, Circuit Judge, held, inter alia, that in view of lack of objection to question and the introduction of substantial evidence to demonstrate defendant's connection with conspiracy, government agent's testimony as to statement by occupier of apartment that the other person therein owned the cocaine was not error, and the improper questioning of defendant as to his awareness of drug problem in community was corrected by prompt objections and court's admonition that jury disregard improper questions.

Affirmed.

1. Criminal Law —427(2)

In order that a statement made outside presence of accused be admissible under coconspirator exception to hearsay rule, there must be proof aliunder of existence of conspiracy and defendant's connection with it.

2. Criminal Law 698(1)

Otherwise inadmissible hearsay to which no objection has been lodged may be considered by trier of fact to the extent of its probative value.

3. Criminal Law —1036.5

If admission of hearsay rises to plain error affecting substantial rights of accused, reversal is warranted. Fed. Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

4. Criminal Law —427(5)

Totally circumstantial evidence of conspiracy and defendant's connection would suffice to support admission of hearsay by coconspirator.

5. Criminal Law —427(5)

Where substantial independent evidence was adduced to prove existence of a conspiracy to possess cocaine and at time sale was made defendant was in adjacent bedroom from which the cocaine and scales used to weigh it were produced and defendant owned scales and helped compute new price for sale after shortage was discovered, there was no error in admitting unobjected to testimony of govern-

ment agent to effect that person in apartment stated that the only other person in apartment was the owner of the cocaine. Comprehensive Drug Abuse Prevention and Control Act of 1970, §c 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

6. Criminal Law —427(3)

Generally, conspirators' statements are admissible even where conspiracy is not established until subsequent point in proof.

7. Criminal Law —680(1), 1153(3)

Order in which evidence is admitted is within discretion of trial court, and absent extratordinary circumstances the order of proof cannot be used as basis for reversal.

8. Criminal Law —706(4), 730(3)

Asking defendant, being tried for conspiracy to possess and for possession with intetnt to distribute and to distribute cocaine as to whether he was aware of community drug problems was error, but the quick objection thereto and court's immediate instruction to disregard the improper question removed prejudice from error.

9. Criminal Law —1171.1(1)

Reversal is required only when prosecutor's improper conduct injects such immaterial or extraneous points into deliberation process that prompt instruction to disregard cannot remove the prejudice.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

CLARK, Circuit Judge:

Defendant William Leaman was convicted by a jury on March 2, 1976, of conspiracy to possess, possessing with the intention to distribute, and ditributing cocaine. 21 U.S.C. §§841(a)(1) & 846. On appeal Leaman raises three contentions: hearsay evidence was improperly admitted; the evidence is insufficient to sustain the conviction; and reversibly prejudicial questions were asked by the prosecutor. We affirm.

The testimony of Drug Enforcement Administration Agent Jose Roque indicated that on August 28, 1975, he arranged for the purchase of cocaine from a then-unknown supplier. The arrangements were made through Mitchell Solomon who thought Roque to be nothing more than a buyer of narcotics. After a meeting between Roque and Solomon during which Roque was shown a sample of cocaine, a sale was arranged for later in the day. Roque and Solomon went to the apartment of Carol Brock in order to exchange cash for the contraband. The following extract from Roque's testimony described the succeeding events:

> At this point I asked her [Carol Brock] if I could search her apartment for the purpose of a possibility of someone hiding in the closet because at this time I had not seen any drugs. For all I knew there was someone waiting for me, an attempted

> armed robbery for the $20,000. She said that wouldn't be necessary; that there was only one other person in the apartment; that he was the owner of the cocaine; that he did not want to see me; and he did not want me to see him. She never did give me his name. [Emphasis supplied.]

The defense did not object when Roque gave this testimony, but on appeal defendant argues that Roque was improperly permitted to introduce hearsay into evidence. Roque then testified that Brock informed him the full one pound of cocaine agreed upon was not available and the owner of the drug was in the back room recomputing the purchase price to reflect this shortage. Upon briefly being left alone, Roque took the cocaine to other agents outside the apartment, ascertained that the substance was indeed cocaine, and then returned with his fellow agents to arrest those involved. When the arrest occurred, Leaman was the only other individual in the apartment.

[1] In order to determine whether sufficient evidence was presented to sustain the conviction, it is first necessary to consider whether Roque's reference to Brock's statement that the other person in the apartment owned the cocaine is properly included in the equation. Leaman contends that this evidence was inadmissible since the premise for its use was that it was the statement of a coconspirator. In order for a statement made out of the presence of the accused to be admissible under the coconspirator exception, "there must be proof aliunde of the existence of the conspiracy and the defendant's connection with it." United States v. James, 510 F.2d 546, 549 (5th Cir.), cert. denied, 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975). Complaint is also made that there was no requirement that

the existence of the conspiracy and Leaman's linkage to it to be proven prior to the admission of the coconspirator's statement. United States v. Apollo, 476 F.2d 156 (5th Cir. 1973). No objections of this sort were raised at the time the evidence was presented.

[2, 3] Otherwise inadmissible hearsay to which no objection has been lodged may be considered by the trier-of-fact to the extent of the probative value. Flores v. Estelle, 513 F.2d 764, 766 (5th Cir. 1975), cert. denied, 423 U.S. 989, 96 S.Ct. 401, 46 L.Ed.2d 308 (1975); United States v. Jimenez, 496 F.2d 288, 291 (5th Cir. 1974), cert. denied, 420 U.S. 979, 95 S.Ct. 1407, 43 L.Ed.2d 660 (1975). Nonetheless, if the admission of the hearsay rises to plain error affecting substantial rights of the accused, reversal is warranted. Fed.R.Crim.P. 52(b); Flores v. Estelle; Smith v. United States, 343 F.2d 539, 542 (5th Cir.), cert. denied, 382 U.S. 861, 86 S.Ct. 122, 15 L.Ed.2d 99 (1965); Glenn v. United States, 271 F.2d 880, 883 (6th Cir. 1959). The case at bar, however, does not present any such plain error possibility.

[4, 5] Totally circumstantial evidence of the conspiracy and the defendant's connection would suffice to support the admission of hearsay by a coconspirator. Park v. Huff, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824, 96 S.Ct. 38, 46 L.Ed.2d 40 (1975). Here, substantial independent evidence, both circumstantial and direct, was adduced to prove the existence of a conspiracy. United States v. Nixon, 418 U.S. 683, 701, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974). The record evidence to demonstrate Leaman's connection with this conspiracy, though not overwhelming, was clearly substantial enough to support the jury's verdict. At the time the sale was made, Leaman was

in the adjacent bedroom from which the cocaine and the scales used to weigh it were produced; he owned the scales, he helped compute the new price for the sale after the shortage was discovered. His attempt to ascribe innocent purposes to these activities, at most, raised a jury issue. Because we conclude there was no error in the admission of the statements, defendants' ancillary contention as to the insufficiency of the proof to sustain the conviction is without merit.

[6, 7] We note but also reject Leaman's argument that admission of this hearsay was improper because it was adduced before existence of the conspiracy had been shown. The principal authority relied on, United States v. Apollo, 476 F.2d 156 (5th Cir. 1973), is distinguishable not only because of the failure to object, but also on other grounds. There, the evidence of Apollo's connection with the conspiracy was entirely dependent upon hearsay statements of coconspirators. At the time of a proper contemporaneous objection, the Apollo trial court erroneously overruled the objection and refused instructions to the jury to limit consideration of these statements pending the laying of a proper predicate. Indeed, the court even affirmatively advised the jury that hearsay was proper proof in such cases. Our holding in Apollo that the introduction of hearsay before the conspiracy was proven under the circumstances there present did necessitate reversal, was accompanied by restatement of the general rule that conspirators' statements are admissible even where the conspiracy is not established until a subsequent point in the proof, id. at 163, and that the order in which evidence is admitted is within the discretion of the trial court and, absent extraordinary circumstances such as were present there, cannot be the basis for reversal.

The final argument presented by Lesman concerns statements made by the prosecutor during the questioning of the defendant. The first question posed was "Are you aware of the drug problem in the community?" After objection and an instruction to the jury to disregard this statement, the prosecutor asked, "Are you aware that drugs are common in this community?" Again objection was made and the jury told to disregard this question also. A motion for a mistrial was denied.

[8, 9] There was no justification for the questions, particularly not the second. Their asking was error. The Government offers no basis for the questions other than that they were proper cross-examination. This is insufficient. The attempt to discredit the defendant by allusions to general problems of drug abuse in the community carries too clear a potential for visiting upon his defense an association with offenses other than those charged to pass muster. However, the quick objection and the court's immediate instruction to disregard each time the improper question was presented, prevents a finding that the suggestion of a drug problem in the community vitiates this conviction. Cf., United States v. Bell, 165 U.S.App.D.C. 146, 506 F.2d 207, 225-26 (1974); United States v. Gilbert, 447 F.2d 883 (10th Cir. 1971). Reversal is required only when the prosecutor's improper conduct injects such immaterial or erroneous points into the deliberative process that prompt instruction to disregard cannot remove the prejudice. Though the questions should not have been asked, they did not approach an irreparable fouling of the jurors' deliberations.

The judgment is

AFFIRMED.

[TITLE OMITTED]

(Filed Feb. 19, 1977)

ON PETITION FOR REHEARING

(Filed Feb. 17, 1977)

Before TUTTLE, CLARK and RONEY, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Charles Clark

Unitetd States Circuit Judge